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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1290

UNITED STATES OF AMERICA, PETITIONER

v.

ITT CONTINENTAL BAKING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Relying largely on the dictum in *United States v. Armour & Co.,* 402 U.S. 673, 682, that "the scope of a consent decree must be discerned within its four corners," respondent contends that because the consent order in this case in terms prohibited only "acquiring" but not also "acquiring and retaining," the retention of assets acquired in violation of the order was not a continuing offense subject to separate penalties for each day the illegal retention continued. *Armour,* however, involved a quite different situation, and this Court's construction of the antitrust consent decree involved in that case as not barring Greyhound's acquisition of Armour does not support the court of appeals' ruling in this case that only a single penalty could be imposed for each of the illegal acquisitions and retentions.

Armour involved the consent decree in the *Meatpackers* case, which prohibited Armour from engaging in the retail food business and therefore would have barred Armour from acquiring Greyhound, because of Greyhound's food business. The question was whether the decree also barred Greyhound from acquiring Armour. The government's theory was that the purpose of the decree was to separate the meatpackers from the retail food business and that the acquisition of Armour by Greyhound would produce the very kind of interlocking relationship the decree sought to bar. This Court, however, declined to interpret the decree to include "a structural separation such as the Government claims" (*id.* at 680); it concluded that the decree "bars only active conduct on the part of the defendants" (*id.* at 678), but that "there is no prohibition against selling any interest to a grocery firm, or more generally against entering into an ownership relationship with such a firm" (*id.* at 679; footnote omitted).

The issue in *Armour* thus was whether Greyhound's acquisition of Armour violated the prohibition in the decree against Armour's engaging in the retail food business. This Court interpreted the decree as not prohibiting that acquisition, since it barred action only by Armour but not by Greyhound.

In the present case, however, the issue is not whether respondent violated the order—the court of appeals held that it had—but whether that violation continued as long as respondent continued to hold the illegally acquired assets. That question cannot be answered by the simplistic reasoning that because the order prohibited only the acquisition, the retention of assets acquired in violation of the order is not a "continuing failure or neglect" to obey the order within the meaning of the penalty provisions of the Clayton and Federal Trade Commission Acts.

Rather, as explained in our opening brief, the answer requires consideration of the purpose of the Commission proceeding, the objective of the order and the aim of the statutory penalty provisions to encourage compliance with Commission orders by imposing significant penalties for disobedience. As we there showed, the acquisition and retention of assets are integral parts of a single course of conduct, and it is the continued retention of the assets that produces the adverse economic effects Congress sought to prevent in Section 7 of the Clayton Act.

In this case, unlike *Armour,* the parties agreed that "[t]he complaint may be used in construing the terms of the order" (App. 73). The complaint charged that since 1952 respondent had acquired a substantial number of bakeries throughout the United States (App. 65-66) and that among the effects of those acquisitions has been the elimination of the acquired firms "as independent competitive factors in the manufacture, sale and distribution of bread and bread-type rolls" and a significant increase in "the trend to industry-wide concentration of the manufacture and sale" of those products (App. 67-68). Appendix A, attached to the agreement between respondent and Commission counsel, sets forth the reasons why the parties believed that the consent order was in the public interest (App. 72-73). It pointed out that under the order, which provided for divestiture of the nation's eighth largest baking company (App. 79) and the 10-year ban upon acquisitions, "the respondent's alleged continuous practice of acquiring companies baking and selling bread and bread-type rolls will be brought to a halt and the major acquisition forming the gravamen of the complaint will be undone" (App. 84).

The obvious purpose of the 10-year ban on acquisitions was to insure that during that period Continental's practice of acquiring bakeries "will be brought to a halt."

Respondent apparently recognizes (Br. 33) that the Commission may compel divestiture of assets acquired in violation of its order. Similarly, there could be little question that if an order required divestiture by a certain date, the retention of assets beyond that date would be a continuing violation for which daily penalties could be imposed. Cf. *United States* v. *Beatrice Foods Co.*, 403 F. 2d 1259, 1274 (C.A. 8), pending on petition for a writ of certiorari, No. 73-1798. The basic reason that leads to that result in those situations—that divestiture is required because retention of the assets violates the order—is equally applicable here. It compels the conclusion that the retention of assets acquired in violation of a Commission cease-and-desist order subjects the violator to separate penalties for each day it continues to hold the illegally acquired assets.

2. Respondent makes three additional arguments which, it asserts, it may submit as alternative grounds for affirmance of the court of appeals' judgment limiting the government to a single $5,000 penalty for each of the three acquisitions which the court held violated the order. These arguments, however, are not grounds for affirmance of the court of appeals judgment. One of the arguments would require reversal, and the other two are irrelevant to the question whether the government is entitled to daily penalties. Since respondent did not file a cross-petition raising those issues, it cannot now argue them. See the cases cited in our opening brief, p. 25.

a. Respondent contends (Br. 41-46) that none of the three challenged transactions constituted an "acquiring of assets" within the meaning of the consent order. The court of appeals held, however, that the three transactions violated the order (Pet. App. 4A-7A).[1] Since the district court had held that only two of the three transactions were illegal (Pet. App. 14A-15A) and had therefore assessed only two penalties, the court of appeals affirmed those penalties but remanded the case for the district court to assess a single penalty for the third violation (Pet. App. 9A-10A).

Although respondent apparently is willing to accept the judgment of the court of appeals subjecting it to single penalties for each of the three violations found, its argument that the transactions did not violate the order would lead not to affirmance of that judgment but

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[1]In each transaction the bakery terminated its own manufacturing operation, and thereafter distributed Continental's bakery products to the same customers to whom it previously had distributed its own products (Pet. App. 4A-7A). The court of appeals held that "all three agreements accomplished the same purpose, which was to acquire indirectly such an interest or control in the business or the assets of the local baker so as to have him cease production" (Pet. App. 7A). In effect, as the court explained with respect to the Sheppard Baking Company transaction, which the district court had not considered to be a violation, respondent acquired "[t]he market and the volume" of the bakeries, which was one of their "principal asset[s]" *(ibid.)*. This reasoning reflected the district court's finding that "particularly in businesses where route salesmen are involved, customer lists have a peculiar value, and * * * they frequently represent the principal asset of a business" (Pet. App. 14A), and that the most important assets respondent acquired "were sales routes and sales volume" *(ibid.)*. These transactions violated the prohibition in the order against "acquiring directly or indirectly * * * any part of the * * * assets of any concern * * * engaged * * * in the production and sale of bread and bread-type rolls * * * " (App. 74).

to its reversal. For if Continental's acquisitions of the portion of the business of the three independent bakeries involved did not violate the order, then obviously no penalties, single or daily, could properly be assessed against it.

Respondent's argument thus constitutes a direct challenge to the judgment itself, rather than an alternative ground for affirming it. The argument seeks to overturn the fundamental premise of the judgment against it—the holding that the acquisitions violated the order. Such an attack upon a judgment, which if accepted would require reversal, can only be made by filing a cross-petition for certiorari.[2]

Our submission on this point is not inconsistent with the position the government recently took in its reply brief in *The Emporium Capwell Co.* v. *Western Addition Community Organization* and *National Labor Relations Board* v. *Western Addition Community Organization*, Nos. 73-696 and 73-830. In those cases the National Labor Relations Board held that an employer had not committed an unfair labor practice by discharging employees for engaging in concerted activity designed to compel the employer to bypass the union that represented them and bargain directly with them over allegedly racially discriminatory employment practices. The court of appeals, although upholding the Board's finding that the employees had attempted to bargain with the employer, set aside the order on the ground that the statute might protect the employees' conduct, and remanded the case to the Board to make additional findings it considered necessary to resolve that issue.

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[2] Had such a petition been filed, it is unlikely that the Court would have granted it, since the court of appeals' ruling that the three tranactions violated the order turns upon the particular facts and has no significance beyond this situation.

The Board petitioned, arguing that the court of appeals had erred in ruling that in these circumstances employees had a right to attempt to bargain directly with the employer. In their brief on the merits, the employees argued that in fact they had not attempted to bargain with the employer but had sought only to redress grievances. The Board's reply brief stated that the employees' failure to cross-petition should not be viewed as barring them from arguing that the record did not support the Board's finding that they had attempted to bargain. It stated (Br. 3) that "a responding party who is willing to accept the judgment of a lower court should 'be under no obligation to file a petition or cross-petition as a protective measure in the event his opponent should seek Supreme Court review.' Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763, 779 (1974)."[3]

The situation in *Western Addition* is quite different from that here. In *Western Addition* the respondents sought to support the basic judgment of the court of appeals setting aside the Board's order. While their argument logically would lead to a modification of the court's judgment (eliminating one of the issues to be considered by the Board on remand), the respondents there were willing to accept the court of appeals' remand without modification.

In the present case, in contrast, the respondent does not accept the correctness of the court of appeals' judgment that the acquisitions violated the order, but instead seeks to argue that no violation occurred--that

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[3] The Board went on to argue, however, that in its discretion the Court should not consider the issue, which raised only a factual question (Br. 4).

the judgment should have been entered in favor of it rather than the government. Thus, unlike the respondents in *Western Addition*, respondent here seeks to overturn the court of appeals' judgment. It cannot bring that issue before this Court without having filed a cross-petition for certiorari through the semantic sleight-of-hand device of saying that, although the ruling was incorrect, it nevertheless accepts it. The government's seemingly broad statement in *Western Addition* was not intended to cover the different situation here involved, and must be read in the light of the issue before the Court in that case.

b. Respondent also argues that because of the absence of a provision in the order making it applicable to "successors and assigns," respondent cannot be held liable for penalties incurred after it acquired Continental in September 1968 (Br. 46-52), and that neither it nor Continental may be subjected to daily penalties for the period following the Commission's own determination that the three transactions violated the order, because of the agency's failure to advise the company of its view (Br. 52-58).

The three acquisitions in this case occurred in July 1965 (Bon Ton), April 1966 (Wyoming Baking Company), and August 1966 (Sheppard Baking Company) (Pet. App. 4A-6A). Respondent concedes (Br. 52) that it is liable for Continental's violations of the order that took place prior to its acquisition of Continental. Since that acquisition occurred two and three years after the transactions that were held to violate the order, respondent's contention, even if accepted, would not support the court of appeals' judgment that penalties be limited to the single act of acquisition.

Respondent's argument would establish only that daily penalties could not be assessed after it acquired Continental in 1968; it would not establish that such penalties could not be assessed for the two or three years before that date when Continental held the illegally acquired assets.[4]

The same infirmity exists in respondent's third alternative ground for affirmance. Although the record does not show the date on which the Commission concluded that the three transactions violated the order, it was a substantial period after they took place. The parties stipulated (App. 51-52):

> [T]he staff of the Commission commenced an investigation in July 1966 involving certain of the operations of Continental as they related to the provisions of the Commission's consent order. This inquiry continued until July 10, 1968, at which time the staff formally reported to the Commission with respect to the results of such investigation and recommended that the Commission certify a civil penalty action to the Attorney General based upon the factual situations set forth in counts 1, 2 and 3 of the present complaint.

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[4]Although the district court expressly held that respondent had assumed Continental's liabilities under the consent order (Pet. App. 16A), the court of appeals held that on the facts before it, this extended no further than respondent's concession of liability for violations prior to the merger (Pet. App. 7A-8A). The court did not consider whether, if the violations were continuing, the district court's determination would extend liability to the date of the complaint. This issue will have to be determined on remand, if the judgment is reversed.

As part of the staff's inquiry, Continental was from time to time requested to supply information as reflected in various of the exhibits constituting attachments to the stipulation. The final request for information directed to Continental itself by the Commission's staff was on May 12, 1967 (S.E. 19). Two investigational hearings were conducted, one on May 2, 1967 (Sneesby, I.H.) and one on May 16, 1967 (Hebert, I.H.).

The commission certified the case to the Attorney General for the institution of a penalty suit on August 2, 1968 (App. 52, 128).

These facts show that a substantial time elapsed between the three transactions and the Commission's determination that they violated the order. Just as in the case of respondent's argument concerning successors and assigns, acceptance of respondent's notice contention could not result in affirmance of the court of appeals' judgment that the continuing retention of the illegally acquired assets did not give rise to daily penalties. That contention would only reduce the period for which daily penalties could be imposed.

These two contentions are issues to be considered in the first instance by the court of appeals or the district court upon remand, if this Court agrees with the United States that daily penalties are assessable for these violations of the order. There is no occasion for this Court to reach out to decide these additional questions, which the court of appeals did not reach. Cf. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 542; *Federal Trade Commission* v. *Borden Co.*, 383 U.S. 637, 646-647.

Respectfully submitted.

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NOVEMBER 1974.